

UNITED STATES TAX COURT
WASHINGTON, DC 20217

CLC

FRANCES M. SCOTT &)	
GALEN L. AMERSON,)	
)	
Petitioners,)	
)	
v.)	Docket No. 26717-14.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

On October 21, 2016, we entered an “Order of Dismissal and Decision”, granting respondent’s oral motion to dismiss for lack of prosecution and entering decision in this case in favor of respondent. Now before the Court is a document that the Court received from petitioners that same day entitled “Notice of Objection to Oral Motion to Dismiss for Lack of Prosecution”. We will treat petitioners’ document as a motion to vacate decision under Rule 162, which we will grant, and as a motion for reconsideration of opinion under Rule 161, which we will deny; and we will order petitioners to show cause why we should not impose upon them a penalty under section 6673(a)(1).

Prior proceedings

On April 19, 2016, we gave notice that this case would be tried at the Tax Court’s Denver session beginning September 19, 2016. On August 5, 2016, the Clerk of the Court served the parties a Notice that stated, “The parties are reminded that this case is calendared for trial or hearing at the Trial Session beginning September 19, 2016.” On September 6, 2016, the Court received from petitioners and filed a “Motion to Dismiss All Actions”. By order dated September 8, 2016, we denied petitioners’ motion, explaining (1) why petitioners are not unconstitutionally deprived of a jury trial; (2) why the undersigned judge is not prevented from deciding this case by any conflict of interest; (3) why petitioners’

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theory that the Internal Revenue Code is not law is without merit; and (4) why the relief petitioners ostensibly request--dismissal of their petition--would not have the effect they seem to suppose but under section 7459(d) would instead constitute a decision that the deficiency is the amount determined by the the IRS. Our order also stated:

Petitioners are advised that section 6673(a) authorizes the Tax Court to require the taxpayer to pay the United States a penalty of as much as \$25,000 whenever it appears to the Court that the taxpayer instituted or maintained the proceeding before the Court primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless. Petitioners are urged to forego the frivolous arguments advanced in their motion to dismiss and, instead, to prepare to litigate valid issues at the trial of this case.... The case will be tried as scheduled.

When the case was called from the calendar on September 19, 2016, there was no appearance by or on behalf of petitioners, despite the April 19 notice, the August 5 reminder, and our order dated September 8, 2016. Respondent appeared through counsel and orally moved to dismiss for lack of prosecution. By order dated September 19, 2016 (and served September 27, 2016), we ordered petitioners to respond to the oral motion.

On September 26, 2016, we received from petitioners a document entitled "Notice of Appeal to the 10th Circuit Court of Appeals", which had evidently been mailed September 18, 2016, i.e., the day before the calendar call. By order of September 29, 2016, we explained, "Because no decision has yet been entered resolving this case, a notice of appeal is not yet timely". In that order we cited the provisions of Rule 193 and 26 U.S.C. sec. 7482(a)(2)(A) as to interlocutory appeals, and explained that such an appeal is possible only if we "include[] in an interlocutory order a statement" of the sort described in the statute, which we explicitly declined to do. We denied petitioners' request for an interlocutory appeal and stated "that our order dated September 19, 2016, is not modified, and that petitioners shall file by October 7, 2016, the response required of them by that order."

We did not receive petitioners' response to the oral motion to dismiss by October 7, 2016, nor for two weeks thereafter. We therefore dismissed this case pursuant to Rule 123(b) by our "Order of Dismissal and Decision" entered on October 21, 2016.

Petitioners' recent filing

However, on the same day (October 21, 2016), we received petitioners' untimely "Notice of Objection to Oral Motion to Dismiss for Lack of Prosecution", dated October 20, 2016. The principal contention of this document is that their supposed appeal to the U.S. Court of Appeals for the Tenth Circuit stayed these proceedings and justified their nonattendance when this case was called on September 19, 2016:

- a. Petitioners filed Notice of Appeal on September 18, 2016, of the September 8, 2016 decision and Order entered by Judge David Gustafson, denying the "Motion to Dismiss All Actions," filed on September 2, 2016.
- b. Petitioners filed and served on September 18, 2016 Notice of Appeal, by USPS first class, certified mail, into the court in Washington DC, as directed by Tax Rule 10(e), which is the only address given for filing documents.
- c. Petitioners filed September 18, 2016 Notice of Appeal, along with original copies of all the required forms to file their appeal, into the 10th Circuit Court of Appeals, on September 20, 2016.
- d. Petitioners assert that the pending interlocutory appeal, acted as a stay of the proceedings, while the Appeals Court Clerk awaited documents from the tax court. All the documents, having been timely and properly filed, accepted into the 10th Circuit Court of Appeals and served prior to judgment, as a right in accordance with Tax Court Rule 4(a) and Tax Court Rule 4(2)(4)(A) [*sic*].
- e. Petitioners served the 10th Circuit Court of Appeals documents on September 20, 2016, to all appropriate parties by USPS first class, including the Tax Court in Washington, DC, in accordance with Tax Court Rule 10(e), while additional documents were awaited to be filed by the Tax Court into the 10th Circuit Court of Appeals, according to the Clerk of the 10th Circuit Court of Appeals.
- f. Petitioners assert that the mailbox rule was applicable, and that their Notice of Appeal post marked and served on September 18, 2016, was a proper substitution, for a personal appearance.

g. Petitioners assert that the appeal would need to proceed prior to any further action by the Tax Court.

Vacating decision

We assume that petitioners' attempted response to the motion to dismiss for lack of prosecution was, though untimely, submitted by them with reasonable promptness under the circumstances. We therefore do not disregard petitioners' document but instead treat it as a motion to vacate decision under Rule 162. We grant the deemed motion to vacate, in order to be able to address their contentions as to the motion to dismiss for lack of prosecution.

Denial of reconsideration

We also treat petitioners' document as a motion for reconsideration under Rule 161, but we deny it in that respect, because petitioners' contentions lack merit.

There is no "Rule 4(a)" or "Rule 4(2)(4)(A)" in the Rules of Practice and Procedure of the United States Tax Court. Petitioners presumably have in mind Rule 4 of the Federal Rules of Appellate Procedure ("FRAP"); but FRAP 4 governs appeals from the U.S. district courts, not the Tax Court. It is FRAP 13 that governs appeals from the Tax Court. Neither FRAP 4 nor FRAP 13 has any provision that would grant jurisdiction to a Court of Appeals in this case. A petitioner has the right to appeal "after the entry of the Tax Court's decision". FRAP 13(a)(1). (A "decision" of the Tax Court, see 26 U.S.C. sec. 7459, is the equivalent of a "judgment" of a district court.) But when petitioners filed their "Notice of Appeal to the 10th Circuit Court of Appeals", the Tax Court had not yet entered its decision. Petitioners' purported appeal was therefore premature and of no effect.

Interlocutory appeals (i.e., appeals of non-final orders that do not constitute "decisions") are provided for in FRAP 13(b), which calls them "Appeals by Permission" and implements 26 U.S.C. sec. 7482(a)(2)(A), cited above and discussed in our order of September 29, 2016. As we explained in that order, we did not grant such permission but rather declined to include in our order the statement required for interlocutory appeal.

Moreover, even if an interlocutory appeal in this case had been authorized, section 7482(a)(2)(A) explicitly provides:

Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.

This Court has not ordered a stay, and petitioners make no showing (nor even any allegation) that the Court of Appeals has done so.

Petitioners have cited no basis, and we know of none, for their suggestion that their filing of a premature notice of appeal deprived this Court of jurisdiction to proceed with this case. Petitioners evidently profess that, when this Court ordered them to appear on Monday, September 19, 2016, petitioners had the unilateral power to excuse themselves from appearing, simply by mailing a notice of appeal on Sunday, September 18. Then, even if the Court of Appeals had dismissed their appeal, they would presumably have the right to further proceedings in the Tax Court--subject always to their filing another notice of appeal. Petitioners would thus have the power to make their case bounce back and forth between the Tax Court and the Court of Appeals at their whim, forestalling the adjudication of their case and thereby delaying indefinitely the assessment and collection of their tax liabilities. It is not so.

We will therefore not reconsider our order granting the motion to dismiss for lack of prosecution. Petitioners had been given repeated reminders that they were ordered to appear for trial on September 19, 2016, but they failed to do so.

Penalty under section 6673(a)

However, we will not yet re-enter decision in this case, because we now will consider whether to include in that decision the imposition of a penalty under section 6673(a)--something about which we warned petitioners in our order dated September 8, 2016. Section 6673(a)(1) provides that where proceedings are “instituted or maintained by the taxpayer primarily for delay” or where “the taxpayer’s position ... is frivolous or groundless, ... the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of \$25,000.”

We tentatively conclude that petitioners’ conduct falls within the ambit of section 6673: The positions advanced in their motion to dismiss about the Constitution and the Internal Revenue Code are frivolous. Their non-appearance

had the intended consequence of delaying the case, as did their foredoomed argument that their premature, invalid appeal somehow stayed proceedings here-- despite the Court's explanatory order of September 29, 2016.

However, we will give petitioners an opportunity to correct any misunderstanding or error on our part that might have misinformed that tentative conclusion, and an opportunity to comment on factors that might mitigate petitioners' culpability, or that should influence the amount of penalty that we impose (up to the statutory maximum of \$25,000). For a non-exclusive list of factors the Court can consider, see Leyshon v. Commissioner, T.C. Memo. 2015-104, *25-*29 (prior proceedings; prior warnings; prior penalties; non-frivolous arguments; protest; amount at issue; taxpayer's background; burden; conduct; other harm to the taxpayer; future compliance; punitive and deterrent effects).

It is

ORDERED that petitioners' "Notice of Objection to Oral Motion to Dismiss for Lack of Prosecution" filed October 21, 2016, is characterized as a motion to vacate decision under Rule 162 and a motion for reconsideration of opinion under Rule 161. It is further

ORDERED that petitioners' deemed motion to vacate decision under Rule 162 is granted, and that their deemed motion for reconsideration of opinion under Rule 161 is denied. It is further

ORDERED that, no later than December 1, 2016, petitioners shall show cause (i.e., shall explain in writing in a submission filed with the Court) why the Court should not impose on them a penalty under section 6673(a)(1) and why, if such a penalty is imposed, it should not be in the maximum amount of \$25,000.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
November 3, 2016